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In The

Supreme Court of the United States

No. 73-660

C. A. NEFF, SUPERINTENDENT OF FIELD UNIT #21,
Petitioner,

v.

FRANCIS J. MORAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court–State Library Building
Richmond, Virginia 23219

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In The

Supreme Court of the United States

No. .....

C. A. NEFF, SUPERINTENDENT OF FIELD UNIT #21,
Petitioner,

v.

FRANCIS J. MORAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

C. A. Neff, Superintendent of Field Unit #21, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on September 11, 1973, in the case of Francis J. Moran v. C. A. Neff, Superintendent, Field Unit #21. This judgment vacated the prior Memorandum Decision of that Court dated June 28, 1973, and the order of July 19, 1973, denying the petitions for rehearing filed on behalf of both parties.

OPINIONS BELOW

The memorandum order of the United States District Court for the Eastern District of Virginia, Alexandria

Division, of March 20, 1973, is not reported but is included herein as Appendix A (App. p. 1). The Order denying the Motion to Alter and Amend Judgment is included herein as Appendix B (App. p. 9). The initial memorandum decision of the United States Court of Appeals for the Fourth Circuit dated June 28, 1973, is similarly unreported, but is included herein as Appendix C (App. p. 10). The order of July 19, 1973, denying petition for rehearing is also unreported and is included herein as Appendix D (App. p. 11). The final order of the United States Court of Appeals for the Fourth Circuit dated September 11, 1973 is likewise unreported and is included herein as Appendix E (App. p. 12).

JURISDICTION

The jurisdiction of this Court to issue a Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Did The United States Court Of Appeals For The Fourth Circuit Err In Affirming The Determination Of The District Court That The Petitioner Had Exhausted His Available State Court Remedies Under 28 U.S.C. § 2254 With Regard To The Allegedly Erroneous Instruction?

II.

Did The United States Court Of Appeals For The Fourth Circuit Err In Affirming The Decision Of The United States District Court For The Eastern District Of Virginia Where That Court Did Not Consider That If The Petitioner Had In Fact Exhausted His Available State Court Remedies That The Supreme Court Of Virginia Under The Circumstances Must Have Concluded That Alleged Instructional Error Was Harmless Beyond A Reasonable Doubt?

STATUTES PRESENTED

Code of Virginia (1950), as amended

§ 19.1-284. *Petition for writ of error to assign errors; transcript; writ of certiorari.*—Any party for whom a writ of error lies may apply therefor on petition, which shall assign errors. With the petition there shall be a transcript of record of so much of the case wherein the judgment complained of is as will enable the Court or judge to whom the petition is to be presented properly to decide on such petition, and enable the Court, if the petition be granted, properly to decide the questions that may arise before it. Upon a suggestion of a diminution of the record a writ of certiorari may be awarded by the Court or judge in vacation.

Rules, Supreme Court of Virginia

Rule 5:3. *Petitions for Appeal and Briefs in Opposition.* (Former Rule.)

§ 1. *Form and Contents of Petition.* Except as provided in this Rule, and except when the appeal is a matter of right, the form, contents and length of the petition for appeal shall conform in all respects to the requirements for the appellant's opening brief, but need not be printed. The petition for appeal may be adopted as and in lieu of the opening brief if the election to do so is stated in the manner required by § 2 of this Rule. If so adopted it shall be printed and distributed as the record is printed and distributed under Rule 5:12, § 4, except that it shall be printed under separate cover.

Rule 5:12. *Briefs.* (Former Rule.)

§ 1. *Form and Contents of Appellant's Brief.* The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall

be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one counsel practicing in this Court, and his address.

STATEMENT OF THE CASE

The petitioner was tried in the Circuit Court for Caroline County, Virginia, on February 18, 1972, before a jury on a charge of possessing controlled drugs with intent to distribute same in violation of § 54-524.101(a), Code of Virginia (1950), as amended. The evidence at trial consisted entirely of the testimony of Investigator L. B. Mitchell of the Virginia State Police and Mrs. Faye D. Taylor, a drug chemist for the State Board of Pharmacy. At the conclusion of the evidence, the Court granted certain instructions to the jury, including an instruction based on § 54-524.101(a) of the Code which allowed the jury to convict the defendant "solely" on the basis of evidence as to the quantity of the drugs. This instruction was objected to by the petitioner but the objection was overruled and the jury thereafter came in with a judgment of conviction and the petitioner was sentenced to serve five (5) years in the Virginia State Penitentiary and pay a $1,000 fine. Counsel

for the petitioner thereafter filed a Notice of Appeal and Assignments of Error which, among other things, stated that:

> "6. The Court erred in ruling and instructing the jury that it could find Defendant guilty of the offense charged solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed by him." (See Notice of Appeal and Assignments of Error attached hereto as Appendix F.)

The petitioner subsequently filed a Petition for Appeal which set forth at several points—the Subject Index, the Statement of Questions Presented and the sub-headings under the Argument—the issues being relied on by petitioner for reversal of the judgment and in none of these places was any mention made of the allegedly faulty instruction. The only reference to that instruction, in fact, is a fleeting mention made during the course of an argument that:

> "Warrantless Search Beyond Area Of Arrestee's Person Is Illegal." (See Petition for Appeal attached hereto as Appendix G at App. 25.)

On October 13, 1972, only ten (10) days after the Court's decision in *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S.E.2d 217 (1972), holding the grant of a similar instruction to be erroneous, the Supreme Court of Virginia refused a Writ of Error to the petitioner, Francis J. Moran (See Order of Supreme Court of Virginia attached hereto as Appendix H). The petitioner then filed a Petition for Rehearing (See Appendix I) and rehearing was rejected by order of the Supreme Court of Virginia dated November 28, 1972 (See Appendix J).

The petitioner filed a petition for a writ of habeas corpus dated December 23, 1972, in the United States

District Court for the Eastern District of Virginia, Alexandria Division and the Court ordered the petition filed by order of December 26, 1972. The respondent, by counsel, thereafter filed an answer admitting that petitioner had exhausted his available State court remedies with regard to the search and seizure question raised but denying that there had been any exhaustion with regard to the instruction issue and praying that the Court deny and dismiss the petition in connection with that issue without prejudice. By order dated March 20, 1973, the Court granted the petitioner a writ of habeas corpus based on the giving of the instruction in question and the Court determined "that the petitioner exhausted his state remedies when the Supreme Court of Virginia summarily dismissed Moran's complaint, without reasons given for the denial of this specific claim even though it was subsequent to *Sharp*." Counsel for the respondent then filed a Motion to Alter and Amend the Judgment reiterating that there had been no exhaustion of State court remedies with regard to this issue but asserting that, even if the Court found exhaustion, the Supreme Court of Virginia must have determined that the granting of the instruction was harmless error in light of the evidence. By order dated March 27, 1973, the Court denied this motion on the grounds that the Assignments of Error did list the instruction in question as one of the errors, that the Petition for Appeal at page 9 did discuss the objection, that in his Traverse and Response to respondent's answer, counsel for the petitioner asserted that he was advised that the Court had another challenge to the constitutionality of this section before it and no decision would be made until the constitutionality of the statute was determined and that the issue had specifically been brought to the attention of the Supreme Court of Virginia by the Petition for Rehearing. The District Court's orders

were appealed to the Court of Appeals by both parties and a memorandum Decision was issued in each of the cases on June 28, 1973, denying and dismissing the appeals, without the case being briefed or argued before the panel although the District Court had granted a certificate of probable cause. Petitions for rehearing were filed on behalf of both parties but were rejected on July 19, 1973. Thereafter, on September 11, 1973, the panel of the United States Court of Appeals for the Fourth Circuit vacated the two prior orders and issued a Memorandum Decision affirming the judgment of the District Court for the reasons stated by that Court.

ARGUMENT

I.

The Courts Below Erred In Holding That There Had Been Exhaustion Of The Available State Court Remedies Insofar As The Alleged Instructional Error Is Concerned In Light Of The Fact That The Petition For Appeal Did Not Include This As An Error And Further In Light Of The Fact That The Issue Was Not Presented To The Supreme Court Of Virginia Squarely Until The Filing Of A Petition For A Rehearing And That Court Has Previously Held That It Will Not Take Cognizance Of Issues Raised For The First Time In A Petition For Rehearing.

The Rules of the Supreme Court of Virginia and § 19.1-284 of the Code of Virginia (1950), as amended, clearly provide that the Petition for Appeal filed in that Court "shall assign errors" and shall include "a statement of the questions presented with a clear and exact reference to the particular assignment of error to which each question relates" (See Rules 5:3, § 1 and 5:12, § 1(d) of the Former Rules of the Supreme Court of Appeals of Virginia which were in effect at the time of Moran's appeal). Thus, the fact that the petitioner had objected at trial to the granting of

the allegedly erroneous instruction in question and assigned the granting of that instruction as an error in his Notice of Appeal and Assignments of Error can be of no solace to him when the alleged error was not thereafter referred to as a ground for the granting of the appeal in the Petition for a Writ of Error or Petition for Appeal (See Appendix F, Notice of Appeal and Assignments of Error filed by Moran, and Appendix G, Petition for Appeal filed in Supreme Court of Virginia by Moran). As a matter of fact, it it respectfully submitted that under the Code of Virginia and its Rules, the Supreme Court of Virginia was bound not to consider this error and undoubtedly assumed that the issue had been abandoned since the filing of the Notice of Appeal and Assignments of Error. It should be pointed out that the Assignments of Error list seven numbered errors assigned and yet the Statement of Questions Presented on page 1 of the Petition for Appeal lists eight questions with specific references being made to errors 1, 2, 3, 4, 5 and 7 previously assigned with no reference whatsoever made to Assignment of Error No. 6 (See Appendix G at App. 17). The sole inference that logically can be drawn from this state of facts is that counsel for Moran had conciously and deliberately abandoned assignment of error no. 6.

After the Writ of Error was refused and the appeal dismissed, counsel for Moran made a belated effort to present the issue to the Supreme Court of Virginia by filing a Petition for a Rehearing but such petition could not effectively resurrect an issue previously abandoned and the issue consequently was never presented to the Supreme Court of Virginia in a timely or proper manner. The Supreme Court of Virginia has held, in the case of *Tazewell* v. *Herman,* 108 Va. 416, 60 S.E. 767, 61 S.E. 752 (1908), that:

> "What constitutes a personal payment thereof, within the meaning of Article II of the Constitution, was not involved in the case—was not argued by counsel for the defendant in error, and was not considered or passed upon by the Court. A failure, therefore, to pass upon that question furnishes no ground for granting a rehearing." (108 Va. at 425).

Thus, the Supreme Court of Virginia is limited on rehearing to a consideration of the issues that have been properly presented to it in the Petition for Appeal previously filed and considered. The United States District Court for the Eastern District of Virginia, Richmond Division, has recently held that raising an issue for the first time on a petition for rehearing does not satisfy the exhaustion requirements of 28 U.S.C. § 2254, citing *Tazewell* v. *Herman, supra* (See *Miller* v. *Lukhard,* Civil Action No. 59-73-R (E.D. Va. April 20, 1973)). However, the failure of the petitioner to properly comply with the appellate rules of the Supreme Court of Virginia, which have not been attacked by Moran as being unreasonable or amounting to a denial of due process, or the procedural statutes of Virginia, does not preclude his initiating a petition for writ of habeas corpus in either the Circuit Court of Caroline County or in the Supreme Court of Virginia (See §§ 8-596 and 17-19, Code of Virginia (1950), as amended).

It is further submitted that 28 U.S.C. § 2254(b) provides that exhaustion of State Court remedies must be accomplished prior to an application for a writ of habeas corpus in the Federal Courts and those remedies are not deemed exhausted if there is an available procedure in the state to raise the question presented. In addition, as your Honors have recently held in the case of *Picard* v. *Connor,* 404 U.S. 270 (1971), the Federal claim must be fairly presented to the state courts. In *Picard* the petitioner had

attacked in state proceedings the legality of his indictment on the ground that the procedure for indicting him had not complied with Massachusetts law. In the Federal courts, on the other hand, the petitioner was arguing that the indictment procedure utilized was a denial of equal protection of the law. The federal District Court involved denied the petition for the failure of the petitioner to exhaust available State court remedies and the United States Court of Appeals for the First Circuit reversed that decision. This Honorable Court reinstated the District Court's judgment and said:

> "The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not." (404 U.S. at 276; see also *Slayton* v. *Smith*, 404 U.S. 53 (1971).)

This determination, and the philosophy inherent therein, has consistently been adhered to (See, e.g., *Murch* v. *Mottram*, ... U.S. ....., 34 L.Ed.2d 194 (1972)).

It is respectfully submitted, therefore, that there is a procedure available in the Commonwealth of Virginia to test the validity of Moran's allegation which has not been previously utilized in a timely and proper manner. Moran may present his allegation by Petition for Writ of Habeas Corpus in the Circuit Court of Caroline County or in the Supreme Court of Virginia pursuant to the original jurisdiction of that Court. But to allow the petitioner to present in the federal courts by federal habeas corpus an issue which has not properly been presented procedurally in Virginia, would be to allow the petitioner to by-pass the Virginia Courts. The respondent respectfully submits that comity

between federal and state courts requires that Virginia first be allowed to consider a properly presented claim (See *Schneckloth* v. *Bustamonte,* ..... U.S. ....., 36 L.Ed.2d 854, 876 (1973)).

II.

Even Assuming, Arguendo, That Moran Has In Fact Exhausted His State Court Remedies, The Federal Court Should Assume That The Supreme Court Of Virginia, In Light Of Its Decision In Sharp v. Commonwealth, 192 S.E.2d 217 (1972), Just Ten Days Prior To Its Denial Of A Writ Of Error In This Case, Determine That The Granting Of The Instruction Herein Was Harmless Error And The Federal Courts Should Have Accepted That Determination In The Absence Of Any Compelling Evidence To The Contrary.

Petitioner herein, of course, asserts that Moran did not ever properly exhaust his available State court remedies by presenting, within an appropriate procedural context, the instructional issue to the Supreme Court of Virginia. However, this argument will be predicated upon the theory adopted by the United States District Court for the Eastern District of Virginia, Alexandria Division, in its ruling on the Motion to Alter and Amend that the Virginia Supreme Court must have considered the issue. In that event, then we must assume, that the Supreme Court of Virginia acted either in total ignorance of its holding ten days earlier in *Sharp, supra,* or we must assume that the Supreme Court of Virginia deemed the granting of the instruction to be harmless error. The District Court in its order and response to the Motion to Alter and Amend the Judgment, stated that counsel for Moran had been advised that the Supreme Court of Virginia had before it another challenge to the constitutionality of the section and no decision would be forthcoming in Moran's case until the statute's constitutionality had been determined in the other case. Thus, in

light of that specific finding by the Judge of the District Court, it must be assumed that the action of the Supreme Court of Virginia was taken in full recognition of the implication of the *Sharp* case and was not done in ignorance.

As has been previously pointed out, the only evidence adduced at trial was the testimony of Investigator Mitchell and the testimony of the State Drug Chemist, Mrs. Taylor. Investigator Mitchell testified at some length regarding the quantity of drugs found in the cab of Moran's truck, and he further testified that a number of the drugs were in separate small envelopes, and an additional quantity of small envelopes had been found in another package. The respondent herein had been advised of his rights and told Investigator Mitchell "that he had purchased these small envelopes to use to put the tablets in as he sold them to other drivers or other people." Investigator Mitchell was, at a later point in the trial, called by Moran as his witness, and during the course of that testimony, Investigator Mitchell pointed out that he had probably arrested in the neighborhood of 100 truck drivers for the possession of drugs similar to these, and the amount of drugs possessed by petitioner was considerably more than had been found on any of these previous truck drivers. There was no evidence produced by Moran that was inconsistent with any of this evidence. Thus, the only evidence that the jury had before them relative to the question of possession with intent to distribute was evidence affirming the existence of such an intent. *Even if the Supreme Court of Virginia, therefore, did consider the issue in question on its merits, the Court must necessarily have decided that the instruction in question amounted to harmless error beyond a reasonable doubt in light of the overwhelming nature of the evidence against Moran and the absence of any other evidence negat-*

ing the possession of the drugs with the requisite intent to distribute (See *Lavallee* v. *DellaRose,* ..... U.S. ....., 35 L.Ed.2d 637 (1973)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted and the judgment in this case reversed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., an Assistant Attorney General of Virginia, counsel for C. A. Neff, Superintendent, Field Unit #21, in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 16th day of October, 1973, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Howard B. Silberberg, Esquire, 933 North Kenmore Street, Arlington, Virginia 22201, of counsel for respondent herein.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

APPENDIX A

* * *

ORDER

Shortly after 10:00 p.m., on September 8, 1971, State Police Investigator Mitchell received a telephone call at his home from an informer concerning sale and possession of controlled drugs at a truck-stop motel near Ashland, Hanover County, Virginia. The informant provided descriptions of the defendant, Moran, and his tractor-trailer rig along with motel room and license tag numbers. (T. 29-31) Mitchell called in three other police officers who then devised an undercover plan whereby Mitchell would attempt to purchase drugs from the defendant. Yet, when the police arrived at the nearby motel at 12:30 a.m., the suspect had departed. Very soon thereafter they saw his rig heading north on Interstate 95 in Caroline County. Mitchell pursued and pulled the truck over telling Moran he had probable cause to believe he was transporting illegal drugs and that his vehicle would be searched. (T. 45) Moran jumped down from the cab of the truck and was immediately searched whereupon the police discovered a vile of pills on his person. (T. 46-47) A subsequent search of the inside of the cab, which could not be seen or reached from the ground, revealed drugs in the glove compartment, a cigar box, brief case, and suitcase, all of which had to be opened. (T. 51-54) Consequently, Moran was arrested and advised of his rights. (T. 55) There was no intention to arrest Moran had drugs not been discovered. (T. 65)

I.

The question presented initially is whether the police conducted a lawful warrantless search. It is well settled that evidence obtained by a search in violation of a de-

fendant's constitutional rights is inadmissible. *Mapp* v. *Ohio,* 367 U.S. 463 (1961). Therefore, before a warrantless search or arrest is deemed proper, the prosecution must establish that probable cause existed for the search or arrest and that exigent circumstances obviated the requirement to procure a magistrate's independent judgment. *Beck* v. *Ohio,* 379 U.S. 95, 97 (1964); *McDonald* v. *United States,* 335 U.S. 451, 456 (1948). The right to search without a warrant need not be dependent upon probable cause to arrest where police officers have a reasonable belief that a vehicle contains contraband. *Chambers* v. *Maroney,* 399 U.S. 42, *rehearing denied* 400 U.S. 856 (1970); *Carroll* v. *United States,* 267 U.S. 132 (1925); *McKoy* v. *Commonwealth,* 212 Va. 224, 183 S.E.2d 153 (1971).

The first step in establishing probable cause in a case such as this is by evaluating the credibility and reliability of the informant. In *Aguilar* v. *Texas,* 378 U.S. 108 (1964), the court established a two-pronged test to measure the effect of an informant's reliability on a police officer's determination of probable cause. It must affirmatively appear to a neutral and detached magistrate that the officer was informed of some of the "underlying circumstances" from which it could be concluded that the informant was reliable and the information credible. There is a three-tiered method of analysis for testing the validity of an informant's conclusions. First, the information can be corroborated by the informant's knowledge of minute detail and particularity. Secondly, direct personal observation can assure firsthand knowledge of facts rather than mere suspicion or rumor. And finally, actual participation in the illegal activity carries its own degree of credibility since it is a declaration against penal interests.

Credibility and reliability can further be ascertained by an affiant's averment that the informant was known and

has proven himself by having previously furnished other information which was instrumental in procuring convictions. Moreover, the affiant's own knowledge of the alleged suspect's reputation or subsequent observation of incriminating actions by the suspect may corroborate an informer's accusation. *See Spinelli* v. *United States,* 393 U.S. 410 (1969); *Manley* v. *Commonwealth,* 211 Va. 146, 176 S.E. 2d 309 (1970).

The standards where police act without a warrant are at least as stringent as those required for an affidavit. *Aguilar, supra,* at 111; *Whiteley* v. *Warden,* 401 U.S. 560 (1971); *McCray* v. *Illinois,* 386 U.S. 300, 305 (1967); *Wong-Sun* v. *United States,* 371 U.S. 471, 479 (1963). The mere existence of probable cause is not sufficient to justify noncompliance with the warrant procedure. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 451 (1971); *Angello* v. *United States,* 269 U.S. 20, 33 (1925). It is fully recognized that:

> The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." (Citations omitted.) *Coolidge, supra,* at 455.

In reviewing the evidence presented at the suppression hearing in the case at bar, the basic issue is whether probable cause was sufficiently established. There is little doubt that there was a substantial basis for believing in the credibility and reliability of the informant since he had furnished

accurate information on numerous prior occasions which was instrumental in procuring convictions. (T. 23-28) Furthermore he had personally observed Moran selling drugs and heard him make a statement that he had a large quantity remaining to sell. (T. 29-31)

Although the informant failed to state exactly when the drug transactions occurred or where the pills might presently be stored, it was not unreasonable to presume that the informant was referring to narcotics dealings made that day and that the drugs could most likely presently be found on the defendant's person or in his motel room, or maybe in his tractor-trailer rig. For these reasons, there was adequate probable cause to search the motel room and perhaps the rig and to arrest the defendant.

If in fact, as this Court so finds, probable cause to search existed immediately following the informant's phone call, did the decision to proceed without a warrant invalidate the subsequent search and arrest? Over a half-century ago the Supreme Court stipulated in *Weeks* v. *United States,* 232 U.S. 383, 392 (1914) (dictum), that it was a recognized right of the government to conduct a warrantless search of the accused, when he was legally arrested, in order to obtain the fruits and evidences of the crime. This was further articulated in the decisions rendered in *Carroll* v. *United States, supra,* at 153 (dictum), and *Agnello* v. *United States, supra,* at 30, where the Court extended the scope of the incidental search respectively to *items* found within the control of the accused and to the *place* where the arrest was made.

Exceptions to the requirement of a warrant for search and seizure have continued to be judicially developed from the court's interpretation of the Fourth Amendment. One of the earliest cases to deal with such an exception was *Carroll* where a special rule was formulated permitting warrant-

less searches of automobiles when it was not practicable to secure one. The court upheld the stopping and searching of an automobile which officers had reasonable or probable cause to believe was carrying illegally transported contraband even though they had no ground upon which to arrest anyone. The opinion of Mr. Chief Justice Taft said, in part:

> The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. Id. at 158, 159.

Therefore when reasonable cause exists the accused can be searched for evidence which is illegally possessed and which can be used in the prosecution. Id at 153.

The Fourth Amendment, *U. S. Const.* amend. IV, protects the right of the people from ". . . unreasonable searches and seizures, . . . but upon probable cause. . . ." The Court in *Harris* v. *United States,* 331 U.S. 145 (1947), expounded on this right when it stated that "the Fourth Amendment has never been held to require that every search and seizure be effected under the authority of a search warrant." Id. at 150. The philosophy of *Harris* was further developed in *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), where the court reasoned that the validity of a warrantless search should be guided by a standard of reasonableness taking into account the "facts and circumstances . . . the total atmosphere of the case." Id. at 66. Moreover, "the mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches" and does not solely turn on whether it is practicable for the officers to procure a search warrant. Id. at 64.

The testimony in the present case reveals that Officer Mitchell admittedly desired to circumvent the warrant process in order to protect his informant's identity. (T. 33) However ill-founded this reasoning is, it was done in good faith. There is no evidence that the scheme the police officers devised was for the primary purpose of extending the scope of the search, by making it incident to a lawful arrest, beyond what they already were capable of discovering. To the contrary, their intention allegedly was to acquire first-hand knowledge of Moran's participation in drug trafficking in order to give cause to an arrest and subsequent limited search. In effect then this presents the difficult task of balancing the principles underlying the requirement of an impartial determination by a magistrate against police officers' professional judgment on how best to ferret out crime. *See Johnson* v. *United States,* 333 U.S. 10 (1948). In weighing this it must be recognized that where the basis for an arrest or search comes from information supplied by an informer, further corroborative investigation by the police may contribute as much to one's freedom from unreasonable searches and seizures as does an independent judgment of a magistrate and therefore ought not to be discouraged. Moreover, nowhere has there been established a right of a defendant to be arrested at a particular time. *United States* v. *Bradley,* 455 F.2d 1181 (1st Cir. 1972). In the case at bar Mitchell had no intention of arresting or detaining Moran unless he discovered narcotics within his possession. Although there was probable cause to arrest and search it would have been futile to hold the defendant only on the word of an informer without the fruits of the crime. Thus the investigative tactics, although dilatory with reference to the procurement of a warrant, were not so unreasonable as to constitute a conscious disregard and avoidance of the warrant process.

There is no doubt that under *Chambers* v. *Maroney, supra,* Mitchell, having probable cause to search Moran, was justified in stopping the tractor-trailer rig for a warrantless search when he saw the out-of-state truck on a highway leading out of the jurisdiction. A fleeting motor vehicle which is reasonably thought to contain contraband automatically gives rise to the requisite exigent circumstances necessary to validate a warrantless search. It is well settled by the Supreme Court that there is a significant difference between a home and an automobile which can be readily moved from the area. Thus the standards for procuring a warrant and the extent of the search are considerably more liberal when a motor vehicle containing contraband is involved.

Consequently, exigent circumstances justified the police's failure to obtain a warrant and the extent of the search conducted throughout the defendant's tractor-trailer rig. Accordingly, it is Ordered that summary judgment on the issue of suppression of the evidence be awarded in favor of the respondents.

II.

The second issue presented here involves the propriety of the trial judge's statements and predilections. Although the presiding judge did make some general remarks about the absurdity and foolishness of certain aspects of the suppression hearing, it appears to be harmless error if any error at all. His comments came at a point when a question arose as to whether or not a police officer must reveal if his informant had actually purchased drugs previously from the defendant or if he only witnessed such a transaction. He held that since tests admittedly were not run on any pills prior to arrest the knowledge of actual procurement versus simple witnessing was irrelevant. Thus knowledge of this

fact served no purpose other than to reveal the informant's posture in the case, and subsequently his identity, thereby endangering his life. (T. 59-63) It appears that the judge restricted his remarks to this line of questioning only when he stated, "That is this part of it, not the fact he stopped the truck without cause." (T. 62) Therefore there is no apparent prejudice exhibited against the real issue and purpose of this suppression hearing.

III.

Finally, Moran attacks the constitutionality of the statutory presumption relating to possession with intent to distribute. This Court finds that, in light of *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S.E. 2d 217 (1972), the instruction based on § 54-524.101(a) of the Virginia Code is unconstitutional. It is this Court's determination that the petitioner exhausted his state remedies when the Supreme Court of Virginia summarily dismissed Moran's complaint, without reasons given for the denial of this specific claim even though it was subsequent to *Sharp.* Accordingly, it is Ordered that the sentence be vacated and the defendant released unless the Commonwealth elects to retry him within sixty (60) days.

Petitioner is advised that should he desire to appeal, written notice of appeal must be received by the Clerk of this Court within thirty (30) days of the date of this Order.

The Clerk is directed to send a copy of this Order to the petitioner, respondent, and the Attorney General of Virginia, and to return the transcripts of the state proceedings to their proper custodian.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
March 20th, 1973

APPENDIX B

* * *

ORDER

The respondent has filed a Motion to Alter and Amend Judgment, asserting again that petitioner has failed to exhaust his available state court remedies insofar as the relief awarded petitioner based on *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E. 2d 217 (1972), is concerned. The motion is denied, it appearing to the Court:

1. That the Assignments of Error filed by petitioner listed the instruction to the jury condemned in *Sharp* as one of the errors.

2. That petitioner's Petition for Appeal (p. 9) *did* discuss the objection made by counsel at trial to the giving of this instruction.

3. That counsel for petitioner was advised that the Supreme Court of Virginia had before it "another challenge to the constitutionality of Sec. 54-524.101(a), Code of Virginia and no decision would be forthcoming in Petitioner's case until the statute's constitutionality was determined." ("Traverse and Response," p. 2.)

4. That this issue was specifically brought to the attention of the Supreme Court of Virginia by the Petition for Rehearing addressed to that court to no avail.

The motion is also denied with regard to the contention that the instruction was harmless error. While there is other evidence of guilt, from a reading of the record this Court cannot say the evidence of guilt at the trial was overwhelming. It consisted of the defendant's admission and the quantity of drugs found. The former should be viewed with

caution; the weight given the latter was certainly accentuated by the impermissible instruction.

Accordingly, it is ordered that the motion be denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
March 27th, 1973

APPENDIX C

* * *

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Submitted: June 7, 1973 Decided: June 28, 1973

MEMORANDUM DECISION

These two cases are cross appeals. In 73-1437 Francis J. Moran, a Virginia prisoner, seeks a certificate of probable cause to appeal that portion of a district court order denying certain of his claims in a petition for a writ of habeas corpus. In 73-1438 the Commonwealth of Virginia appeals from that portion of the same order granting habeas corpus relief.

Our review of the record and of the district court's opinion discloses that an appeal from that portion of the order refusing habeas corpus relief would be without merit. Accordingly, in 73-1437, a certificate of probable cause to appeal is denied, and the appeal is dismissed for the reasons

stated by the district court. *Moran* v. *Neff,* Civil Action No. 508-72-A-M (E.D.Va. 1973).

Our review also indicates that an appeal from that portion of the order granting habeas corpus relief would be without merit. Accordingly, in 73-1438, the appeal is dismissed for the reasons stated by the district court. *Moran* v. *Neff, supra.*

The judgment of the district court is affirmed.

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

/s/ John D. Butzner, Jr.
United States Circuit Judge

/s/ Donald Russell
United States Circuit Judge

APPENDIX D

* * *

ORDER

After careful consideration, and with the concurrence of Judge Butzner and Judge Russell, the petition for rehearing is denied.

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

APPENDIX E

* * *

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria, Albert V. Bryan, Jr., District Judge.

MEMORANDUM DECISION AND ORDER

It appearing to the court that a certificate of probable cause to appeal was issued by the district court, the petitions for rehearing filed in this case are granted. Accordingly, the opinion of this court, issued June 28, 1973, and our order of July 19, 1973, denying the petition for rehearing in No. 73-1438, are vacated. Nevertheless, for the reasons stated by the district court, the judgment of the district court is affirmed.

Entered with the concurrence of Judge Butzner and Judge Russell.

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

APPENDIX F

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Notice is hereby given that Francis J. Moran, Defendant, appeals from the final judgment of conviction rendered by this Court on the 18th day of February, 1972, and announces his intention of Applying for a Writ of Error to the Supreme Court of Virginia.

Assignments Of Error

1. The Court erred in overruling (denying) Defendant's motion to dismiss the indictment because of improper venue.

2. The Court erred in overruling (denying) Defendant's motion to suppress all evidence obtained from Defendant as a result of an unlawful search of and seizure from his person and vehicle.

3. The Court erred by allowing into evidence statements attributed to Defendant after he and his vehicle had been stopped by police officers.

4. The Court erred by receiving into evidence all objects and items obtained from Defendant and his vehicle.

5. The Court erred in denying Defendant's motion for a bifurcated trial to determine guilt and, if necessary, punishment.

6. The Court erred in ruling and instructing the jury that it could find Defendant guilty of the offense charged solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed by him.

7. The Court erred in ruling and instructing the jury that the controlled drugs seized from Defendant's person and his vehicle were Schedule III drugs.

* * *

APPENDIX G

R14193

In The Supreme Court Of Virginia

At Richmond

Commonwealth Of Virginia,

vs.

Francis J. Moran,
Defendant-Petitioner.

PETITION FOR APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF CAROLINE COUNTY ENTERED FEBRUARY 18, 1972

Howard B. Silberberg
and
Nathan L. Silberberg
Attorneys for Defendant-Petitioner

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[1] Statement Of Nature Of Case And Material Proceedings

In a one count indictment, the Grand Jurors of the Commonwealth of Virginia, Carolina County, presented that Defendant-Petitioner (hereinafter called Moran) unlawfully, feloniously and knowingly or intentionally possessed, with intent to distribute, controlled drugs in violation of Sec. 54-524.101(a), Code of Virginia.

Moran moved to suppress evidence seized from his person and vehicle, alleging that the search which disclosed the evidence and his subsequent arrest were unlawful because of the lack of warrants. After a hearing on that motion and his oral motion to dismiss the indictment because of improper venue, the court overruled (denied) the motions. Upon a trial of the indictment before a jury, Moran was found guilty and his punishment fixed at five years imprisonment and a one thousand dollar fine. Judgment was entered thereon and this Petition followed.

Statement Of Questions Presented

1. Must Prosecution Justify Warrantless Search? (Assignments Of Error Nos. 2 & 4)
2. If It Is Practicable To Obtain Warrants To Search And Arrest, May The Police Proceed Without Them? (Assignments Of Error Nos. 2, 3, 4)
3. May Incident Search Precede And Serve To Justify Arrest? (Assignments Of Error Nos 2, 3, 4)
4. Must Court Suppress Illegally Seized Evidence? (Assignments Of Errors Nos. 2, 3, 4)
5. May Police Conduct Warrantless Search Beyond Arrestee's Immediate Vicinity? (Assignments Of Error Nos. 2, 3, 4, 5)
6. Does Criminal Venue Lie Where Crime Is Committed? (Assignment Of Error No. 1)
7. Is Defendant In Criminal Prosecution Entitled To Bifurcated Trial? (Assignment Of Error No. 5)
8. Is Drug Chemist Qualified To Testify As To Drug Effect On Central Nervous System? (Assignment Of Error No. 7)

[2] Statement Of The Facts

A Virginia State Police officer, at a hearing upon Moran's motion to suppress evidence, testified that he received telephonic information at his home from an informant, whom he described as "highly reliable," concerning the sale and possession of controlled drugs at a truckstop-motel near Ashland, Hanover County, Virginia. The officer's home was approximately 2½ miles from the motel. The informant supplied a physical description of the

individual engaged in the drug activity, his motel room number and a precise description of the individual's tractor-trailer rig. The informant did not tell the officer that the individual was preparing to leave the motel. The officer then contacted two other officers and arranged for them to meet at the officer's home to discuss a plan to apprehend the suspect. The officers did not discuss the propriety of obtaining arrest and search warrants.

Approximately 2¼ hours after receiving the informant's call, the officer's arrived at the motel and, not finding the suspect at the motel, drove to Ashland, one-half mile away, to meet the informant. They then returned to the immediate vicinity of the motel and while stopped at a service station observed a tractor-trailer rig matching the informant's description leaving the truckstop.

The officers pursued the rig and stopped it in Caroline County as it was proceeding north on Interstate 95. The officers identified themselves to Moran and informed him that they intended to conduct a search of his rig, whereupon Moran dismounted from the tractor's cab. A search of Moran's person while he was standing on the ground revealed a bottle containing drugs. The officers then proceeded to search the cab's interior as a result of which they found additional pills and capsules contained in the glove compartment, in a suitcase and a cigar box, all of which were closed. From the ground, the officers could see nothing in the cab. When they mounted the cab's steps, they could see only the closed cigar box. After finding the pills and capsules, the [3] officers then placed Moran under arrest and advised him of his rights. He was then escorted to a justice of the peace where an arrest warrant was prepared and served on him.

Argument

A. *Prosecution Must Justify Warrantless Search*

Amendment IV, Constitution of the United States, prohibits unreasonable searches and seizures. That provision is applicable to criminal prosecutions in Virginia. *Hawley vs. Commonwealth* (1965), 206 Va. 479, 144 SE 2d 314; *Gaddis vs. Peyton* (1966), 207 Va. 376, 149 SE 2d 900. Section 19.1-88, Code of Virginia, specifically proscribes the warrantless search of a vehicle. Although that section has been interpreted to prohibit only an unreasonable warrantless search, it is, nevertheless, necessary that the prosecution justify such a search. *Carter vs. Commonwealth* (1968), 209 Va. 317, 163 SE 2d 589; *Coolidge vs. New Hampshire* (1971), 91 S Ct 2022. In *Coolidge* (supra), the Supreme Court of the United States ruled that warrantless searches "are *per se* unreasonable under the Fourth Amendment," subject to a few specific exceptions. It is further held that the prosecution has the evidentiary burden of showing the circumstances bringing a particular search within one of those exceptions.

At the hearing on Moran's motions to suppress, it was established that the police had no arrest or search warrant when Moran was stopped on Interstate 95 (T. 64, 65). The prosecution presented no evidence, testimony or argument upon Moran's motion to suppress, much less a "showing . . . that the exigencies of the situation made that course imperative," *Coolidge vs. New Hampshire,* (supra). Certainly the record provides no justification for the warrantless search.

B. *Warrantless Search And Arrest Cannot Be Made If There Is Time To Obtain Warrants*

From Officer Mitchell's testimony, it is clear that approximately 2½ hours passed between the time he re-

ceived, at his home, located approximately 2½ miles from the truckstop (T. 18, 366), information from the informant and the time the officers arrived at the truckstop. (T. 19, 35). In the interim, Mitchell apparently did nothing to obtain arrest and/or search warrants. Indeed, he testified that the officers, while meeting at his home, did not discuss the propriety of obtaining a warrant. (T. 35). They were concerned only with an apprehension plan. (T. 33). The informer, whom Mitchell described as being "highly reliable," had given a detailed physical description of Moran, the motel room in which he was staying, a description of his truck and an account of the drug activity which he had observed in the motel room. (T. 29, 30, 31, 34). Also, the informer had not told Mitchell that Moran was about to depart. (T. 35).

By the clear dicta of *McKay vs. Commonwealth* (1971), 212 Va. 224, 183 SE 2d 153, this Court has served notice that the police, if they have time, must obtain an arrest or search warrant from a magistrate. *McKoy,* like this case, involved the search of a vehicle which was stopped by police on the basis of information they had received from a reliable source. However, in *McKoy,* the police were informed that the vehicle was about to depart from the scene and they had no time to obtain a warrant. Also, unlike this case, in *McKoy* the vehicle's occupants were arrested and then an incident search was conducted. As the Supreme Court of the United States has stated in *Coolidge vs. New Hampshire* (supra),

> . . . Where the discovery of (evidence) is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none

which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of urgent circumstances.

In this case, the prosecution has not only failed to show any facts during a 2½ hour period which prevented the police from seeking warrants; its own officer has testified that there was no discussion as to the propriety of obtaining them. Despite ample time for such action, the police elected to make the decision without recourse to a neutral and detached magistrate. [6] Although the trial court recognized the right to conduct a warrantless search when the police "don't have time" to obtain a search warrant, for some unexplained reason it assumed that no such time was available in this case. (T. 65).

C. *Incident Search May Not Precede And Serve To Justify An Arrest*

Probable cause for a warrantless arrest must exist prior thereto and an incident search may not precede and serve to justify the arrest. *Bryson vs. Commonwealth* (1970), 211 Va. 85, 175 SE 2d 248, *McMillan vs. Commonwealth* (1971), 212 Va. 505, 184 SE 2d 773, *Sibron vs. N. Y.* (1968), 392 U.S. 40. Following an arrest, the police may make a reasonable search and seizure without a warrant. *Carter vs. Commonwealth* (1968), 209 Va. 317, 163 SE 2d 589.

Officer Mitchell testified that the police did not have a search or arrest warrant at the time they stopped Moran's vehicle (T. 64, 65, 131). The operator and truck matched the descriptions of them given by the informant (T. 44, 45). Yet, it was not until *after* the vehicle had been stopped and it and Moran had been searched that Moran was placed under arrest and he was advised of his constitutional rights.

(T. 54, 55, 63, 64, 65, 108). In fact Mitchell testified that Moran would not have been arrested if no drugs were uncovered by the search (T. 65). Thus, it is clear that the probable cause upon which the police made their warrantless arrest is based upon the preceding warrantless search, not upon the information they had obtained from the informant.

D. *Evidence Obtained As Result Of Illegal Search Must Be Suppressed*

Virginia follows the federal evidentiary exclusion rule that evidence obtained in violation of the Fourth Amendment to the United States Constitution is inadmissible in a criminal trial. *Hawley vs. Commonwealth* (1965), 206 Va. 479, 144 SE 2d 314, *Gaddis vs. Peyton* (1966), 207 Va. 376, 149 SE 2d 900.

[7] The search of Moran and his vehicle and his subsequent arrest being illegal, all evidence, real and oral, resulting therefrom should have been suppressed and excluded from his trial. Nevertheless, the court denied his motion to suppress and, over his objections and exceptions, permitted the prosecution to introduce that evidence at trial. (Ltr. Feb. 8, 1972; T. 105-107, 109, 110, 152-156).

At this point Moran suggests that the court was predisposed to rule against his motion to suppress. While there is a great difference between factual possession of a controlled drug and its legal seizure and use as evidence in a criminal proceeding, that distinction appears to have been completely ignored by the court which termed suppression hearings "absurd" and characterized the rulings of the Supreme Court of the United States in the field of search and seizure as "foolishness." (T. 61, 62).

E. *Warrantless Search Beyond Area Of Arrestee's Person Is Illegal*

The police, while conducting a warrantless search, may not go beyond the arrestee's person and the area from which he could obtain a weapon or obtain and destroy something that can be used as evidence against him. *Kirkpatrick vs. Commonwealth* (1970), 211 Va. 269, 176 SE 2d 802.

> With regard to the search of a vehicle incident to the arrest of its occupants, the general rule is the same as for a non-vehicular search incident to an arrest. *Chimel vs. California* (1969), 395 US 752, 762, 763. That is to say, a search may be conducted of the area "within the immediate control of" the person arrested so as to prevent him from gaining possession of a weapon or destructible evidence. . . . For example an officer arresting the driver of an automobile cannot conduct a generally exploratory search of a car from engine compartment to trunk. However, he may search under the driver's seat, in the driver's door pocket, and behind the driver's seat. This implies that the driver remains in the car. (It is doubtful that this right would exist should the driver remove himself from the vehicle.) *Defending Criminal Cases in Virginia, 1971 Ed., Virginia State Bar, The Virginia Bar Association;* p. 66.

The fact that the object being searched is an automobile is no excuse to disregard constitutional and statutory requirements for a search warrant. *Coolidge vs. N.H.* (supra).

[8] Moran's vehicle was stopped entirely within the paved emergency strip on the right side of the road. (T. 43, 44). He exited from the cab when the police identified themselves, taking one or two steps to the ground. (T. 45-

47). The distance between the ground and the cab's seat was six or seven feet. (T. 124). He was searched while standing on the ground by Mitchell and in the immediate presence of another officer. (T. 47, 123). After Moran had been searched, the officers conducted a "thorough" search of the cab's interior. (T. 48-50). Mitchell testified that he could see nothing in the cab while standing on the ground. (T. 52, 124). He had to stand on the cab's step to see the closed cigar box in which drugs were later found. (C'th. Ex. 2; T. 52). Until he was asked to remount the cab, Moran made no move which the officers interpreted as an attempt to get back into the cab. (T. 124, 125).

Thus, according to the police testimony, Moran's truck was posing no danger to traffic and the police could not see into the cab while standing on the ground. Moran was searched while he was standing on the ground with at least one officer in his immediate vicinity. He dismounted the cab voluntarily and offered no resistance to the search of his person or the cab. Moran did not attempt to reenter the cab until instructed to do so by the police. The police did not testify as to any apprehension they may have had for their personal safety. It is clear that the search of the cab extended beyond Moran's person and the area from which he could obtain a weapon or obtain and destroy evidence which might be used against him.

Even if there were probable cause to arrest and search Moran without a warrant, the facts of this case do not justify a further warrantless search of the cab. As stated by the Supreme Court of the United States in *Coolidge vs. N. H.* (supra),

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to

> invoke the meaning and purpose of Carroll vs. U.S.— no alerted criminal bent on flight, no fleetinng opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting [9] to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant, ". . . and the automobile exception," despite its label, is simply irrelevant . . . Here there was probable cause (for the defendant's arrest), but no exigent circumstances justified the police in proceeding without a warrant . . . The later search (of defendant's car *after* he had been arrested) was therefore illegal.

Assuming the warrantless stop and search of Moran was legal, the extension of the scope of the search beyond that point is crucial. Whereas the search of Moran's person revealed only a bottle containing two (2) capsules and three (3) tablets, the search of the cab revealed over ninehundred (900) tablets and capsules (T. 98-102). Sec. 54-524.101(a), Code of Virginia, allows a conviction for intent to distribute to be based solely upon evidence as to the quantity of any controlled drug unlawfully possessed. The jury, over Defendant's objection and exception, was instructed in the precise language of Sect. 54-524.101(a). (T. 209, 212, Instr. 3). Section 54-524.101(c) makes possession of a controlled drug a misdemeanor. The trial evidence clearly shows that the police never observed Moran sell or attempt to sell or distribute any drugs. (T. 134, 135). The prosecution contended that possession of 20-25 tablets or capsules was normal for personal use. (T. 198, 211). Officer Mitchell conceded that it was not uncommon for

truck drivers to take the type of drug recovered from Moran to stay awake. (T. 197, 198). Thus, the five (5) capsules/tablets recovered from Moran's person would be well within the limit established by the prosecution and the jury could have reasonably concluded that Moran intended them for his personal use and not for sale or distribution.

F. *Criminal Venue Lies Where Crime Is Committed.*

Section 19.1-155, Code of Virginia, limits the authority of the grand jury to inquiries and presentments of "felonies . . . committed within the jurisdiction of the respective courts wherein they are sworn . . . ." Likewise, Rule 3A:17, Rules of Criminal Practice and Procedure, confines [10] the prosecution of criminal cases to the "county . . . in which the offense was committed."

The record clearly establishes that any offense charged by the Caroline County Grand Jury occurred in Hanover County. The motel/truck-stop where Moran allegedly possessed and sold drugs was located within Hanover County. (T. 34). The officers planned and attempted to make the arrest in Hanover County. (T. 29, 31, 33, 34). The officers first observed Moran's vehicle in Hanover County. (T. 38, 118, 119). The officers, while in Hanover County, decided to stop and search the vehicle. (T. 38, 39). It was merely fortuitous that the apprehension occurred in Caroline County.

At the hearing on Moran's motion to suppress, he raised the issue as to proper venue. (T. 67, 68). His memorandum in support thereof again raised the venue issue. By letter of February 8, 1972, and at the beginning of the trial, the court "overruled" the motion as to venue. (T. 73). Moran noted his exception to the ruling (T. 73).

G. *Upon Request, Court Must Order Bifurcated Jury Trial To Determine Innocence, Guilt And Punishment.*

Prior to the commencement of the trial, Moran moved for a bifurcated trial to determine, first, guilt or innocence, and then, if necessary, to determine punishment. The motion was denied and an exception was noted. (T. 78-82).

Moran is aware of this Court's disposition of the issue in *Johnson vs. Commonwealth* (1968), 208 Va. 481, 158 SE 2d 725, *Snider vs. Cox* (1971), 212 Va. 13, 181 SE 2d 617, and *Bloodgood vs. Commonwealth* (1971), 212 Va. 253, 183 SE 2d 737, and, also, the majority opinion of the Supreme Court of the United States in *McGautha vs. California* (1971), 402 U.S. 183, citing *Johnson* with approval. However, Moran, nevertheless, respectfully urges the Court to re-examine and reverse itself on this issue and, in support of his position, he refers to the grounds for his [11] motion, 53 *Va. Law Review*, 968, 997, and the dissenting opinion in *McGautha*.

H. *Drug Chemist Not Qualified As To Drug Effect On Central Nervous System*

Sect. 54-524.82, Code of Virginia, lists the drugs which are to be included in Schedule III of The Drug Control Act. Para (a)(1)(3) thereof provides that "any material, compound, mixture or preparation which contains any quantity of amphetamine of methamphetamine" having a potential for abuse associated with a stimulant effect on the central nervous system is included in Schedule III. However, Sect. 54-524.82(e) provides that if any such compound, mixture or preparation is combined with an active medicinal ingredient not having a stimulant effect on the central nervous system, it is exempt from Schedule III and subject to Schedule IV, if such ingredient is present in

sufficient strength to vitiate potential abuse of drugs which have a stimulant effect on the central nervous system.

To establish the character of the drugs seized from Moran and his truck, the prosecution called Faye D. Taylor, a drug chemist from the State Board of Pharmacy. (T. 145). The witness held a Bachelor of Science degree with a major in chemistry and minors in biology and physics. (T. 146). She performed qualitative, not quantitative, analyses of the drugs delivered to her by Officer Mitchell. (T. 165). The analyses showed the presence of ingredients in addition to amphetamine and methamphetamine. (T. 188). She only checked for the presence of ingredients in addition to amphetamine and methamphetamine. (T. 188). She only checked for the presence of aspirin, not other ingredients. (T. 162, 163, 190). She further stated her knowledge was not "complete" as to the effect of stimulants on the central nervous system and that she was not "familiar [12] enough" with the tablet material seized from Moran and his truck to determine how much thereof would enter the central nervous system to cause a stimulant effect. (T. 158, 163, 164). Thus, Moran, having shown that Mrs. Taylor was not qualified to testify as to the effect of stimulant drugs on the central nervous system, that she had not identified all the ingredients in the samples which she analyzed and that she could not state how much of the tablet material would enter the central nervous system, the prosecution did not prove, beyond a reasonable doubt, that the drugs in question were of the Schedule III type. According to the testimony, the seized drugs were of the Schedule IV type for which violation only a misdemeanor conviction would lie. Sect. 54-524.101(b)(2). Moran's motion to strike the Commonwealth's evidence, based partly on Mrs. Taylor's testimony, was denied and an exception taken. (T. 171, 184, 186).

* * *

APPENDIX H

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of October, 1972.

The petition of Francis Joseph Moran, sometimes known as Francis J. Moran, for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Caroline County on the 18th day of February, 1972, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By /s/ Allen L. Lucy
Deputy Clerk

* * *

APPENDIX I

R14193

In The Supreme Court Of Virginia
At Richmond

Commonwealth Of Virginia,

vs.

Francis J. Moran,
Defendant-Petitioner.

PETITION FOR REHEARING

Pursuant to Rule 5.29, Rules of Court, Francis J. Moran petitions this Honorable Court to rehear his Petition for Appeal from the judgment of conviction entered by the Circuit Court of Caroline County on February 18, 1972. As his reasons herefor, Petitioner respectfully shows as follows:

1. As one claim of error, Petitioner contends that, in violation of Sec. 19.1-88, Code of Virginia, and the Fourth Amendment to the Constitution of the United States, he and his vehicle were searched without probable cause and without a warrant and he was then arrested. The prosecution presented no evidence justifying such action and, Petitioner submits, the record reveals no exigencies upon which such conduct could be predicated. Accordingly, the searches were unreasonable and the arrest illegal. *Carter vs. Commonwealth* (1968), 209 Va. 317, 163 SE 2d 589; *Coolidge vs. N. H.* (1971), 91 S Ct. 2022.

2. Over Petitioner's objection and exceptions, the jury, in the precise language of Sect. 54-524.101(a), Code of

Virginia, was instructed that a finding of an intent to distribute controlled drugs may be based solely upon evidence as to the quantity of the substance unlawfully possessed. (T. 209-212; Instr. 3) On October 3, 1972, this Court, in *Sharp vs. Commonwealth,* Record No. 7994, held the subsidiary (evidentiary) provision of Sect. 54-524.101(a) unconstitutional and ordered a new trial for Sharp. Petitioner submits that his claim of error in that regard was properly taken, preserved and argued and that his conviction must also be reversed because of this Court's ruling in *Sharp.*

3. Petitioner asks the Court to consider this Petition without prejudice to the additional claims of error set forth in his Petition for Appeal previously filed herein.

* * *

APPENDIX J

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 28th day of November, 1972.

Francis Joseph Moran, Plaintiff in error,

against

Commonwealth of Virginia Defendant in error.

Upon a Petition to Rehear

On mature consideration of the petition for the plaintiff in error to set aside the judgment rendered herein on the 13th day of October, 1972, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ H. G. T urner
Clerk